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ABSTRACT

In a 1974 Yale Law School address, United States Supreme Court Justice Stewart stated that the institutional press, as far as the Constitution is concerned, is autonomous and may publish what it knows and may seek to learn what it can. He also noted that the Court had rejected the Constitutional claim of a journalist's privilege not to reveal a confidential source or information to a grand jury. As a jurist, Justice Stewart was generally consistent in his opinions both before and after this address in regard to maintaining the autonomy of the press. He regularly demonstrated a sensitivity toward the role of the press in society, and often aligned himself with special privilege arguments presented by journalists, no matter how qualified the privilege might become through judicial modification. His opinions generally reflected a concern for finding a balance between societal and press interests so that freedom of the press would not be unduly impaired or compromised by governmental encroachment. Indeed, he concluded that the Constitution merely established the context in which the press is free to do battle against secrecy and deception in government. (HOD)

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THE PRESS AS AN INSTITUTION OF THE CONSTITUTION: JUSTICE POTTER STEWART'S APPROACH TO THE FIRST AMENDMENT

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THE PRESS AS AN INSTITUTION OF THE CONSTITUTION:
JUSTICE POTTER STEWART'S APPROACH TO THE FIRST AMENDMENT

On October 14, 1958, forty-three-year-old Potter Stewart was appointed by President Eisenhower to the U.S. Supreme Court replacing retiring Justice Harold Burton. Stewart was the second youngest person to serve on the Supreme Court since the Civil War.[1] Upon his appointment journalists asked him to identify himself as either a judicial conservative or liberal, he replied, "I really can't say except that I like to be thought of as a lawyer."[2] Some twenty-two years later, shortly after the announcement of his retirement, journalists asked him how he wanted to be remembered, and he replied, "[a]s a good lawyer who did his best."[3]

Quantitative studies of Justice Stewart's First Amendment voting record have indicated that his overall voting pattern favored First Amendment decisions, and often his vote would be against the First Amendment choice. For example, his voting pattern in obscenity cases found him voting more on the liberal side of the Court; whereas, his voting pattern in cases concerning the operation of the press as a business institution found him voting more on the conservative side of the Court.[4] Consequently, Justice Stewart has been presented by both popular and legal literature as a "swing" vote or a "centrist" on the Burger Court.[5]

A partial explanation of Justice Stewart's voting pattern may be found in his "institutional conservatism." This approach consists of precedent being considered respectively with the Court acting in a cohesive manner in deciding certain types of cases. The main function of the Court, according to this paradigm, is to base the decision on interpretation of the

Constitution.[6] One scholar has dubbed Justice Stewart's approach to freedom of the press as "Stewart Institutionalism." Basically this approach would require the Court to "play a relatively modest role in the political system, except when the Constitution is invoked," and the mass media would be assigned an institutional role within the Constitution.[7]

In 1974 Justice Stewart outlined the parameters of this institutional role of the mass media in his provocative Yale Law School Sesquicentennial Convocation address.[8] He stated that the "institutional" press, as far as the Constitution is concerned, is autonomous and "may publish what it knows, and may seek to learn what it can."[9] This autonomy, however, works two ways: The Constitution merely establishes a contest between the press seeking information and the government trying to protect information.[10] "The constitution," Justice Stewart emphasized, "is neither a Freedom of Information Act nor an Official Secrets Act."[11]

Justice Stewart also noted in his speech that the Court had rejected the Constitutional claim of a journalist's privilege not to reveal his confidential source or information to a grand jury. He reasoned that, all of us, as citizens, have a duty to testify before a grand jury to give our evidence, and we do not have a free speech claim to deny that responsibility. Unless, of course, some immunity or protection is granted by the court. He stated that a reporter could assert the claim of protecting a confidential source "[o]nly if a reporter is a representative of a protected institution."[12]

It might be expected that Justice Stewart's court opinions would reflect this contest between the press and the government which he discussed in his Yale Law School address. Even more importantly, his opinions might be

expected to reflect the special privilege that his interpretation of the Press Clause would seem to guarantee.

This study examined Justice Stewart's opinions during the time he served on the U.S. Court of Appeals and the U.S. Supreme Court to see if he practiced as a jurist what he espoused in his 1974 Yale Law School address.

The central research question of this study is: How has Justice Stewart dealt with the institutional press question in his written opinions both before and after his Law School address? In order to answer this question, Justice Stewart's First Amendment opinions will be examined in two time frames: in cases reviewed before 1974, and in cases occurring after 1974.

Opinions Prior to November 1974

U.S. Court of Appeals' Decisions

While serving on the U.S. Court of Appeals, Sixth Circuit, Justice Stewart wrote six opinions for the Second Circuit, one for the Third Circuit, eighty-one for the Sixth Circuit, and two for the Seventh Circuit.[13] Of these ninety opinions by Judge Stewart, only two were found to be in the First Amendment area, and both cases were from the Second Circuit.

The first case, Volanski v. United States,[14] was an obscenity case, which does not address the institutional press issue referred to in his Yale Law School speech. The second First Amendment case, Garland v. Torre,[15] dealt with a journalist's claim to the First Amendment protection of her confidential source. This opinion, written by Judge Stewart, was the first time the courts had considered such a special privilege claim based on the First Amendment.[16]

In 1958 Judy Garland brought suit against Columbia Broadcasting System, Inc., in district court for breach of contract and alleged false and defamatory statements written by Marie Torre in a newspaper column. Torre had

attributed the statements to a CBS network executive. Garland stated in her deposition that she tried to learn who the sources were but was unsuccessful. In Torre's deposition she stated that the quote in the column was verbatim but refused to reveal the source, arguing that to do so would breach a confidence. The court ordered Torre to disclose her source, but she refused. The court held her in criminal contempt of court.[17]

Judge Stewart affirmed the lower court's ruling. The holding of the Second Circuit was that the First Amendment did not confer upon Marie Torre the right to refuse to answer questions concerning the identity of the network executive, and there was no privilege which would justify her refusing to answer questions concerning the identity of her confidential source. Ultimately, Torre served ten days in jail for contempt of court for refusing to reveal her source.[18]

Judge Stewart stated that what must be determined is "whether compelling the testimony of the witness justifies some impairment of First Amendment freedom."[19] This indeed was a "delicate task," he noted, but not difficult.[20]

"The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press," Judge Stewart reasoned.[21] Consequently, this duty to testify will sometimes impinge upon the witness' First Amendment freedoms. "The freedom to choose whether to speak or be silent disappears," he stated.[22] The freedom of the press issue in this case, he noted, must give way under the Constitution to a "paramount public interest in the fair administration of justice."[23]

He further noted that the concern here was not wholesale disclosure of a journalist's confidential source of information. The point in this case was

that "[t]he question asked of the appellant went to the heart of the plaintiff's claim . . . [and] the Constitution conferred no right to refuse an answer."[24]

Future cases citing Judge Stewart's opinions in Torre have applied the decision to recognize a journalist's special privilege when the plaintiff fails to meet the conditions of one of two tests: either the "heart of the matter test,"[25] or what Gillmor and Barron call "Judge Stewart's threefold test."[26] When the "heart of the matter test" was applied, the plaintiff had to prove the information sought went to the heart of his claim as stated in Torre.[27] When the "threefold test" was applied the plaintiff had to satisfy three conditions before a journalist had to reveal his source. These were stated in Torre as: (1) the information sought should go to the "heart of the plaintiff's claim;" (2) the information sought should not be available from alternate sources; and (3) the information sought should not be patently frivolous.[28]

Prior to Torre most claims by journalists for a testimonial privilege were based either on the common law or on state statutes.[29] With Torre the approach changed when claims were based upon constitutional protection for the journalist. The U.S. Supreme Court cited Torre in 1972 in its Branzburg v. Hayes[30] decision, which dealt with journalists trying to obtain special testimonial privileges in grand jury investigations under the First Amendment. During the fourteen-year period between the Torre and the Branzburg decisions twenty-seven cases citing Torre involving the question of a special testimonial privilege were heard by the courts. Out of those twenty-seven cases, only two cases granted a special testimonial privilege for the journalist.[31]

In Branzburg v. Hayes,[32] the Supreme Court combined three cases where

journalists had refused to testify before a grand jury investigation with respect to confidential sources. In two of the cases, In re Pappas[33] and Branzburg v. Pound,[34] the courts denied the journalists a qualified privilege against revealing their sources. Only in Caldwell v. United States[35] was the journalist's privilege recognized. In a narrow five-to-four majority decision written by Justice White, the Supreme Court held that requiring journalists to testify before state or federal grand juries does not abridge the First Amendment freedom of press guarantee, and a journalist's agreement to source confidentiality is not granted any constitutional privilege. Justice White did note that Congress, as well as state legislatures and state courts, does have the right to fashion rules and standards granting journalists certain privileges, whether absolute or qualified.[36]

Of particular concern was Justice Stewart's dissent, which is discussed more fully in the section below. Justice Stewart called the majority opinion a "crabbed view of the First Amendment," because the opinion was not sensitive to the critical role the press plays in society.[37] In his dissent he outlined what criteria should be met before a journalist has to reveal his source(s):

> (1) [S]how that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law;
> (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and
> (3) demonstrate a compelling and overriding interest in the information.[38]

In terms of his opinion in Torre, Justice Stewart's dissent in Branzburg, in essence, reflects the same threefold test set out fourteen years earlier.

In a footnote to Justice Stewart's Branzburg dissent, he stated that Garland v. Torre[39] recognized a journalist's First Amendment right to a

confidential relationship with his source.[40] In this brief note he seemed to be stating that those courts that had used the Torre tests in all cases as a ban on First Amendment protection were wrong.[41]

Even though Judge Stewart had refused to grant a qualified privilege for the journalist in his Torre decision, he did outline certain parameters which have been utilized by the courts. In the cases citing Torre, the courts granted the journalist special privileges only when the plaintiff failed to meet either of the two tests of Torre. The journalists in those cases were more successful at acquiring a special privilege in civil litigation when the courts had balanced societal interest more on a case-by-case basis. This implies that there may be a common law protection developing at the federal level for a journalist's confidential source privilege.

Indeed, in one federal case, Riley v. Chester,[42] the U.S. Court of Appeals, Third Circuit, noted that Rule 501 of the Federal Rules of Evidence allows the federal courts to develop a special privilege for a journalist on a case-by-case basis. The court held:

> The strong public policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy, expressly recognized in Branzburg v. Hayes, lead us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources.[43]

There was no reference to the Torre decision.

As noted in this section, Judge Stewart received the opportunity to promote his ideas as outlined in his Torre decision when he was appointed to the Supreme Court. The next section will examine those decisions.

Supreme Court Decisions

Justice Stewart wrote seven-hundred Supreme Court opinions including his majority, concurring, and dissenting opinions. Of these seven-hundred opinions one-hundred and forty-five were written in the First Amendment

area.[44] These First Amendment opinions include fifty-three majority opinions, forty-six concurring opinions, and forty-six dissenting opinions.

Prior to the 1974 Yale Law School speech, Justice Stewart wrote thirty-nine majority opinions, thirty-one concurring opinions, and twenty-five dissenting opinions. Of these opinions, however, only eleven concern the "institutional" press issue. For discussion these cases will be divided into four areas: journalist's privilege, libel, access to government facilities, and access to the media.

Journalist's Privilege

In his 1974 Yale Law School address, Justice Stewart stated that the Court, in a five-to-four decision, had rejected the Constitutional claim of a journalist's privilege not to reveal his confidential source or information to a grand jury. He noted, however, that considering the language of Justice Powell's concurring opinion, the vote was closer to "four and a half to four and a half."[45] The case he was referring to was Branzburg v. Hayes.[46]

In Branzburg the Supreme Court had combined three cases in which journalists had refused to testify before a grand jury investigation with respect to confidential sources. Justice Stewart noted in his speech that if this case were a matter of freedom of speech for reporters, then the question of a journalist withholding information would have answered itself. He stated, "None of us--as individuals--has a 'free speech' right to refuse to tell a grand jury the identity of someone who has given us information relevant to the grand jury's legitimate inquiry."[47] A reporter could assert the claim of protecting a confidential source, he noted, only if the reporter was "representative of a protected institution."[48] He further noted that members of the Court disagreed about the way the question of special testimonial privilege should be answered.

The Supreme Court in the plurality opinion of Justice White held that journalists do not have a constitutional right to refuse to testify before a grand jury, and they do have to answer all grand jury questions relating to criminal investigations.[49] The heart of the reporters' claim in Branzburg was that "burden on newsgathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information."[50]

Justice White reasoned that the pres[illegible] more protection than the "average citizen" when asked to disclose information received in confidence. He noted that recognition of this right implied the press required a "privileged position."[51] He cited numerous cases in which the press was denied a privilege greater than those granted the general public. For example, the press is neither free to publish everything it desires to publish, like reckless falsehoods damaging private reputations,[52] nor does it have special access to information unavailable to the general public.[54] He also cited Garland v. Torre[53] as denying the claim of confidential information by a reporter.[55]

Justice Stewart's dissenting opinion was joined by Justices Brennan and Marshall. Justice Stewart observed that the Court was inviting the investigative arm of government to annex the journalistic profession.[56] "Not only will this decision impair performance of the press' constitutionally protected functions," he stated, "but it will . . . in the long run harm rather than help the administration of justice."[57]

Justice Stewart reasoned that the protection of a reporter's confidential source "stems from the broad societal interest in a full and free flow of information to the public."[58] At the center of the First Amendment is the right to publish and a corollary to that right is to gather news.[59]

He argued that the flow of information to the public would be severely curtailed if there was no protection recognized for the newsgathering process.[60]

Justice Stewart reasoned that it is the press' right to gather news, and the journalist has a right to a confidential source(s). He based this reasoning on three predicates:

> (1) newsmen require information to gather news;
> (2) confidentiality--the promise or understanding that names or certain aspects of communications will be kept off the record--is essential to the creation and maintenance of a newsgathering relationship with informants; and
> an unbridled subpoena power--the absence of a constitutional relationship from compulsory process--will either deter sources from divulging information or deter reporters from gathering and publishing information.[61]

Of these three predicates, Justice Stewart was perhaps most concerned with the third one. He noted there are an undetermined number of journalist-source relationships which require a confidential source.[62] With a grand jury provided with an unchecked power to compel a journalist to disclose sources, he reasoned, such sources would stop giving information.[63]

Balanced against a First Amendment-based testimonial privilege for journalists are the societal interests involved in an ongoing criminal investigation by a grand jury. He noted, however, that the grand jury's function of gathering every person's evidence is not absolute.[64] He further reasoned that the balancing of societal interest against First Amendment rights requires "special safeguards."[65] Consequently, Justice Stewart suggested a three-part test to be applied by the courts to determine the relevance of the information[66] He noted that these criteria would neither grant a journalist the privilege of ignoring a subpoena nor would a grand jury necessarily have to satisfy all the listed conditions.[67]

The crux of the Court's decision, Justice Stewart stated, was that

neither the journalist nor the source needed to be concerned about a subpoena from a grand jury if neither the source nor the journalist was implicated in a crime or possessed information relevant to the grand jury investigation.[68] This construct is misleading, he reasoned, and makes it important for the government to show probable cause for the information sought in order "to prevent needless injury to First Amendment values."[69] If journalists have no testimonial privilege, he argued, then they will be asked to testify "about informants who have neither committed crimes nor have information about crime."[70]

The "probable cause" and "alternative means" requirements, Justice Stewart reasoned, would help balance the public's interest in the administration of justice, and the First Amendment protection for news flow.[71] These requirements, he stated, would help avoid a conflict between competing concerns, and at the same time adequately protect the journalists.[72] Justice Stewart concluded:

> The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness, he will cease to investigate and publish information about issues of public importance. I cannot subscribe to such an anomalous result, for in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice.[73]

He further stated that the lower court ruled properly in the Caldwell decision, and he would vacate and remand the other two cases.[74]

A discussion of Branzburg is not complete unless a brief analysis of Justice Powell's concurring opinion is considered. Justice Powell supplied the crucial fifth vote to the majority, but he noted that the Court's holding was limited in nature, because journalists "are not without constitutional rights with respect to the gathering of news or in safeguarding their sources."[75] He argued that the claim of a journalist's privilege should be

judged on its facts and a balance should be struck between press freedom, and the obligation of citizens to testify with respect to criminal conduct. "The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional ways of adjudicating such questions," he concluded.[76]

Justice Stewart's opinion on journalists protecting their confidential sources was not popular with the majority of the Court. As noted below, he stressed in his opinions in libel litigation the sensitive role of the press in society, which a majority of the Court supported.

Libel: The Constitutional Privilege

Justice Stewart stated in his Yale Law School address that in defamation action, as long as officials of the three governmental branches act in their line of duty, they are virtually immune from either defamation or slander suits.[77] He noted that this is a necessary protection in order "to insure bold and vigorous prosecution of the public's business," and the same rationale, he reasoned, is applicable to the press.[78] Prior to his 1974 speech, Justice Stewart wrote five majority opinions which supported this aspect of his speech.

In Greenbelt Cooperative Publishing Association, Inc., v. Bresler,[79] Justice Stewart wrote the majority opinion for a unanimous Court. The Greenbelt News Review, a small weekly newspaper, had published several stories about a series of Greenbelt City Council meetings. At the meetings Charles Bresler, a prominent real estate developer, tried to obtain certain zoning variances which would allow construction of "high-density" housing, and at the same time the city was trying to obtain a tract of land from Bresler for the construction of a city high school. These meetings generated considerable local controversy, and the word "blackmail" was used in the course of a

vigorous debate at one of the meetings. The newspaper used the word in two of its stories, and Bresler sued for defamation because of the use of the word.[80]

Bresler was awarded compensatory and punitive damages by a lower court jury, and the Maryland Court of Appeals affirmed the judgment.[81] The U.S. Supreme Court held that the judge on the lower court had misinformed the jury as to the standard to use to judge the facts of the case, and the word "blackmail" was not considered defamatory.[82]

Justice Stewart reasoned that Bresler was a public figure within the meaning of the New York Times rule. In New York Times Co. v. Sullivan,[83] the Court stated that a public official cannot recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[84] Consequently, Bresler had to prove that the story was written with actual malice in order to obtain damages.[85] Justice Stewart noted that the judge in the lower court had defined malice as "spite, hostility or deliberate intention to harm," which he emphatically stated was an "error of constitutional magnitude." He reasoned that the applied test required a lesser burden of proof than the actual malice standard of the New York Times rule.[86] This alone he noted would be enough to reverse the judgment.[87]

He stated that since this was a public meeting, the situation was of particular First Amendment concern.[88] Because of the threat of financial liability of an alleged defamation, Justice Stewart reasoned, this financial burden might impair the exercise of First Amendment freedoms, and, he noted, "the Constitution imposes stringent limitations upon the permissible scope of such liability."[89]

The truth of the article was never questioned, he noted, but it was the use of the word "blackmail" which brought the suit. He stated, "It was simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized."[90]

In a trilogy of libel cases handed down the same day by the Supreme Court with all majority opinions written by Justice Stewart, the press was successful at warding off libel judgments. In Monitor Patriot Co. v. Roy,[91] Alphonse Roy, a candidate defeated for United States Senate, sued the Monitor Patriot newspaper and the North American Newspaper Alliance for a syndicated column by Drew Pearson published during the election that called Roy a "former small-time bootlegger."[92] The jury returned a $10,000 verdict against both the newspaper and the North American Newspaper Alliance. On appeal, the New Hampshire Supreme Court affirmed the judgment.[93] The U.S. Supreme Court, in a unanimous decision, reversed the lower court's decision. The Court held that the judge had applied a lesser burden of proof than the New York Times rule, and that any information about a criminal charge of a public official was relevant in a public election.[94]

Justice Stewart noted that the judge in his instructions to the jury stated that the publication could be considered false if the statement "had not been made 'in good faith' for a 'justifiable purpose,' and with a 'belief founded on reasonable grounds of truth of the matter published.'"[95] This standard, he noted was less stringent than the "actual malice" standard of the New York Times rule. He stated that this was reason enough to reverse the ruling.

Of particular concern to voters, however, is a candidate's life, Justice Stewart stated. When a candidate runs for public office, every aspect of that

person's life, both public and private, is up for scrutiny by the voters.[96] Often times, he noted, it is hard to determine what information about a candidate's life should be published during an election, especially in terms of information that may be defamatory in nature.[97] He concluded that a "charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office."[98] This, he noted, was part of the reasoning behind the New York Times rule.[99]

In Time, Inc. v. Pape,[100] Time magazine was sued by Chicago Deputy Chief of Detectives Frank Pape for an alleged defamatory article on civil rights violations. Time had reviewed a book entitled Justice, which was the fifth volume of a series written by the United States Commission on Civil Rights.[101] Justice contained a section on police brutality and described at length a situation where Pape allegedly had beaten up and harassed a Negro family in the Chicago suburbs. Time had included this incident in the book review, and had omitted the word "alleged" before describing the incident in the article.[102] Pape's defamation action was based upon the omission of the word "alleged." The district court ruled in favor of Time, Inc. Pape appealed and the Court of Appeals reversed the district court's ruling.[103] In an eight-to-one vote, the Supreme Court held that Time had not engaged in "falsification" of the story to warrant a finding of "actual malice."[104]

Justice Stewart stated that omitting the word "alleged" did not constitute "actual malice," and Pape, according to the Times rule, would be considered a public official. He reasoned to allow this case to go to a jury to determine a lesser standard would be to "impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact."[105] He noted that the "actual malice" standard provides protection for

the publisher who knows errors will occasionally occur, but will not "lay him open to an indeterminable financial liability."[106]

He further noted that any press report may contain an infinite variety of interpretations, and the book review in Time had reported an accurate account of the incident in Justice.[107] Also, the journalist's testimony in district court, in which the journalist stated that the only difference between the two accounts was the omission of the word "alleged," further demonstrated to Justice Stewart that there was no "actual malice" involved in the writing of the book review.[108]

In the last of the trilogy of libel cases, Ocala Star-Banner Co. v. Damron,[109] a public official sued a newspaper for printing a false story. Leonard Damron was running for the office of county tax assessor, and at the time was also mayor of Crystal River. The Star Banner newspaper published a story about Damron stating that he had been charged with perjury in federal court, and that the case was held over until the next term of court. The story was false for Damron, who had not been charged for any crime in federal court, but the story was true for his brother, James Damron.[110]

Damron lost the election two weeks after the story had been published, and filed a defamation action suit against the newspaper. The jury of the Circuit Court of Marion County awarded Damron compensatory damages, and the Florida District Court of Appeal affirmed the judgment.[111] The U.S. Supreme Court held that the New York Times rule was not applied by the court, and reversed the court's decision.[112]

Justice Stewart, writing for the majority, noted that the trial judge in his instructions to the jury stated that its task was to only determine damages, because the article was libelous, per se. Damron, Justice Stewart reasoned, was a public official, and had to prove actual malice in order to

recover damages, as stated in the New York Times rule.[113] Consequently, he concluded, the judgment must be reversed. Justice Stewart further noted that a public discussion about a candidate's qualifications for office was probably the strongest application of the New York Times rule, and a potential perjury charge of a candidate seeking public office was relevant to his fitness for office.[114]

Justice Stewart's libel opinions reflect a protection of the press. This protection, he reasoned, is necessary in order for the press to inform the public and allow the press to fulfill its function in society. He did draw the line, however, when the press argued on behalf of the public for access to governmental facilities.

Access to Governmental Facilities

Justice Stewart in his Yale Law School speech noted that the autonomous press was "free to do battle against secrecy and deception in government."[115] He noted, however, that the Constitution neither guarantees the press that it will succeed in its struggle nor does it give the press access to governmental information. Instead, he stated, the Constitution establishes a contest between the press and the government, and does not assure a winner.[116]

Justice Stewart addressed this aspect of the institutional press issue in two opinions. In Pell v. Procunier[117] and Saxbe v. Washington Post[118] journalists were denied access to both state and federal prisons. In Pell v. Procunier,[119] four California prison inmates--Booker T. Hillery, John Spain, Bobby Bly, and Michael Guile--and three professional journalists--Eve Pell, Paul Jacobs, and Betty Segal--brought suit against the California Department of Corrections alleging the unconstitutionality of section 415.071 of the

Department of Corrections Manual, which stated that the "[p]ress and other media interviews with specific individual inmates will not be permitted."[120]

Justice Stewart, writing for the majority, stated that the restrictive section only removed a privilege that had formerly been enjoyed by the press via the general public's access to the prison.[121] He reasoned that journalists do not have a "constitutional right of access to prisons or their inmates beyond that afforded the general public,"[122] and likewise, there is no constitutional requirement for the government to give the press access to information not to be shared by the general public.[123] In fact, he noted, the press enjoys more access to the California prisons than the general public and the press, journalists can visit the minimum and maximum security areas of a prison, and speak with whomever they please within the confines of security considerations.[124] The journalists can also interview inmates at random, and attend rehabilitation sessions, which generally are not open to the public.[125] He concluded that since the restrictive section of the manual did not affect the general public's access to the prisons, then the section did not abridge the First and Fourteenth Amendment guarantees.[126]

Saxbe v. Washington Post[127] was similar to Pell, except the Washington Post was challenging a policy of the Federal Bureau of Prisons which prohibited personal interviews between journalists and federal inmates.[128] The district court ruled in favor of the Washington Post and held that because the policy prohibited all interviews with inmates it violated the First Amendment. The Court of Appeals affirmed the district court's decision.[129] In a five-to-four vote, the Supreme Court reversed.

Justice Stewart, writing for the majority, noted that this case was not "constitutionally indistinguishable from Pell v. Procunier."[130] He reasoned that the Bureau's Policy statement did not place the press in a less

advantageous position than the general public.[131] Consequently, the press does not have a constitutional claim to access to federal prisons beyond those rights accorded to the general public.[132]

As he had done in Pell, Justice Stewart noted in Saxbe that the press generally had been given greater access to prison facilities than had the general public.[133] For example, the Federal Policy allowed journalists to photograph and tour prison facilities;[134] allowed unlimited written correspondence with the inmates;[135] required prison officials to give all possible assistance to members of the press;[136] and allowed random interviews with the inmates.[137] In addition, Justice Stewart stated, there is always a group of recently released prisoners who can be contacted by the press about the conditions in the federal prison.[138]

Part of Justice Stewart's institutional press argument was that the press should have autonomy from the government. Consequently, if the government granted access to the press to its facilities, this would compromise the press to the government. If this were allowed to happen, then the press could not conduct its job without interference. A similar argument was advanced in those cases where the public was trying to gain access to the media.

Access to Media

Justice Stewart in his Yale law School address reasoned that the government should not interfere with the press. He noted that the Court denied governmental intervention of the media even in cases where such intervention would make the press a "genuinely fair and open 'marketplace of ideas.'"[139] There were two opinions written by Justice Stewart, one concurring and one dissenting, prior to his 1974 speech in which he supported the idea of no governmental intervention. In both Pittsburgh Press Co. v.

Pittsburgh Commission on Human Relations[140] and Columbia Broadcasting System, Inc. v. Democratic National Convention[141] some means of governmental regulation of the media was sought.

In Pittsburgh Press, a Pittsburgh ordinance outlawed discrimination in employment based upon color, race, ancestry, national origin, religion, place of birth or sex. The National Organization for Women, Inc., charged the Pittsburgh Press Co. with violation of the city ordinance by printing sex designated headings in its help-wanted classified advertisements, i.e., "Jobs--Male Interest," or "Jobs--Female Interest," and "Male-Female."[142]

The Commission on Human Relations ordered the Pittsburgh Press to cease using these headings in the classified advertisements, and the order was affirmed upon appeal by the Court of Common Pleas.[143] On appeal, the Commonwealth Court reversed the lower court's ruling, noting that the ordinance was not specific enough in the information that should or should not be printed. After the Commission had rewritten the ordinance the Pennsylvania Supreme Court refused to hear the case.[144]

The U.S. Supreme Court, in a five-to-four vote, held that the ordinance was narrowly drawn, and the Pittsburgh Press could not use sexual discriminatory columns in its classified advertisement section of the newspaper.[145] Writing for the majority, Justice Powell stated that the question in this case is whether the "purely commercial advertisement is distinguishable, for the purposes of First Amendment analysis, from the content of the advertisement itself."[146]

Justice Powell noted that the ordinance was not passed just to "muzzle" or curb the press,[147] and the information in the want ads was considered commercial speech, therefore, subject to regulation.[148] "Discrimination in employment is not only commercial activity," he reasoned, "it is illegal

commercial activity under the ordinance."[149] He noted that "the order [the ordinance] is clear and sweeps no more broadly than necessary,"[150] and that the ordinance did not infringe upon the First Amendment rights of the Pittsburgh Press.

Justice Stewart, in a dissenting opinion joined by Justice Douglas, acknowledged the right of Pittsburgh to prohibit discrimination in private employment, but he argued that the question in this case before the Court was whether any governmental agency can dictate to a newspaper what it can or cannot publish.[151] He argued that as long as the Court viewed the First Amendment as "a set of 'values' to be balanced against other 'values,' that Amendment will remain in grave jeopardy."[152] He noted that what the Court approved was "a government order dictating to a publisher in advance how he must arrange the layout of pages in his newspaper."[153] He admonished that this was the first case where such a governmental intervention was allowed, and he feared that it "may not be the last." He added, "The camel's nose is in the tent."[154] Based upon this opinion, he speculated that the government might force a newspaper to conform in some other socially desirable manner. He queried, "What is there to prevent it from dictating the layout of the news pages tomorrow?"[155]

Justice Stewart concluded that he found the decision "frightening."[156] He wrote: "I believe the constitutional guarantee of a free press is more than precatory. I believe it is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country."[157]

In Columbia Broadcasting System, Inc. v. Democratic National Committee[158] the respondents were requesting governmental intervention in order to enforce what they claimed to be First Amendment rights. The

Democratic National Committee and the Business Executives' Move for Vietnam Peace had filed separate complaints with the Federal Communication Commission about a local television and radio station not running their advertisements. The Democratic National Committee complained about a television station's general policy of refusing to sell time to "responsible entities" to present their views on a public issue,[159] and the Business Executives' Move for Vietnam Peace complained about a radio station's refusal to run certain advertisements promoting the ideas of the group.[160] In two separate opinions, the FCC denied the requests.

On appeal, the U.S. Court of Appeals, District of Columbia Circuit, held that a ban on advertisements of political issues was in violation of the First Amendment.[161] The U.S. Supreme Court held that neither the First Amendment nor the Communication Act requires broadcasters to accept paid editorial advertisements.[162]

Chief Justice Burger, writing for a seven-member majority, stated that the question before the Court was whether the free expression "of the public, the broadcaster, and the individual interests require broadcasters to sell commercial time to persons wishing to discuss controversial issues."[163] He reasoned that "editing is what editors are for; and editing is selection and choice of material."[164] He stated that the television and radio station had acted responsibly, and there was no indication of discrimination against the controversial speech in this case.[165]

Justice Stewart, concurring, pointed out that the Court of Appeals had reasoned that the First Amendment required the government to impose controls on private broadcasters to preserve First Amendment values. He referred to this as a "frightening specter."[166] He viewed this as a first step that

might eventually lead to the "proposition that private newspapers 'are' Government. Freedom of the press could then be gone."[167]

The respondents in this case, Justice Stewart noted, were not denied access to all radio or television stations. Only one out of three television networks turned down the Democratic National Committee's air time request, and the Business Executive's radio announcement was rejected by only one radio station.[168] "Even though it would be in the public's interest for the respondents' advertisements to be heard," he reasoned, "it does not follow that the public interest requires every broadcaster to broadcast them."[169]

The Framers of the Constitution, Justice Stewart argued, believed that a free press and society were indispensable.[170] He reasoned that the Framers believed in fairness, but that fairness was too fragile a guarantee for a bureaucratic government to bring about.[171] "History has many times confirmed the wisdom of their choice," he noted.[172] "If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom."[173]

Justice Stewart prior to his speech generally supported the thesis of his Yale Law School address. He argued for keeping the press autonomous both from the public and the government in order for the press to conduct its job of vigorous prosecution of the public's business. But was he consistent in his opinions after his speech? The next section will examine his opinions after his Yale address.

Opinions After November 1974

After his 1974 Yale Law School address, Justice Stewart wrote fourteen majority opinions, thirteen concurring opinions, and twenty-one dissenting opinions in the First Amendment area. Of these opinions, however, only eight

opinions touched upon the institutional press issue. In order to discuss these opinions fully, the cases will be divided into four areas: journalist's privilege, libel, access to government facilities, and access to the media.

Journalist's Privilege

There was only one case touching upon journalist's privilege in which Justice Stewart participated after his 1974 Yale Law School address. In that case, Zurcher v. Stanford Daily,[174] the journalists claimed that a newspaper should have special considerations in situations in which a search warrant is issued. In a narrow five-to-four vote, the Supreme Court denied the journalists such a privilege. Justice Stewart wrote a dissenting opinion.

The Zurcher case resulted from a demonstration during which a group of students occupied a group of administrative offices of a hospital for a day.[175] The hospital authorities called for the removal of the demonstrators by the police, and when the police tried removing the group, a fight occurred between the police and the students. Damage was done to the hospital, and several police officers were injured.[176]

The Stanford Daily, a student newspaper, published a special issue about the incident which contained articles and several photographs. The police obtained a search warrant and made a surprise search of the newsroom for any information or photographs relating to the hospital incident. The search turned up only the photographs which had been published in the paper.[177]

Several students who worked on the newspaper brought suit in district court against the police department complaining that their First, Fourth, and Fourteenth Amendment rights had been abridged. The district court held that before a search warrant could be issued to police to search a newspaper two conditions had to be met: a clear showing that the information sought might be removed from the premises if a subpoena were used and a clear showing that a

restraining order from the court would be futile.[178] The district court noted that the police had failed to satisfy these conditions and declared that the search of the newspaper was illegal. The U.S. Court of Appeals affirmed the decision, but the U.S. Supreme Court reversed.[179]

Justice White, writing for a five-member majority, noted that the critical element of a search warrant in this case was not that the news procedures were disturbed but that the specific information or things sought were suspected to be on the premises. He stated that judges should be able to guard against the type of searches which would disrupt the timely publication aspects of a newspaper, and if abuse of newspapers by the courts through the use of search warrants occurs, he noted, "there will be time enough to deal with it."[180]

In his dissent, Justice Stewart stated that the search of a newspaper office would "burden the freedom of the press."[181] Basically, he gave three reasons for this view. First, the search could last for an extremely long time which would disrupt the "processes of newsgathering, writing, editing, and publishing."[182]

Second, and perhaps a more serious reason than the first, was the possibility of confidential sources and information being revealed during the search. Justice Stewart stated that protection of a journalist's sources are necessary so that "the press can fulfill its constitutionally designated function of informing the public."[183] He noted that without such protection confidential sources will disappear, and the press will begin to suppress information because of fears of searches by the police.[184] "Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality to his potential sources," he reasoned,

"it seems obvious . . . that a journalist's access to information, and thus the public's, will thereby be impaired."[185]

Third, the difference between a search warrant and a subpoena should be considered. He noted a search warrant would allow the police to "ransack" newspaper files and read all documents until they found the correct one. A subpoena, by contrast, would allow the newspaper to produce the document for the police without disturbing the news operation.[186] Justice Stewart stated that in situations where criminal activity is suspected, then a search warrant is justifiable, but this element was not present in this case.[187] A subpoena, he reasoned, would better serve the "careful balancing of those vital constitutional and societal interests."[188] Also, a subpoena would allow a court to determine how relevant the information was to the needs of the prosecutor before the newspaper had to surrender the information.[189]

While conceding that perhaps a newspaper office deserves no greater protection than that of a doctor or a banker, Justice Stewart argued that in this case the First Amendment should be upheld. "[O]ur Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by the government," he stated, but, "[i]t does explicitly protect freedom of the press."[190]

Libel: The Constitutional Privilege

Justice Stewart noted in his Yale Law School address that public officials were virtually immune from libel or slander suits as long as the officials were acting in their line of duty. He also stated this was important to ensure a vigorous public debate about public issues, and this same rationale applies to the press.[191] After his 1974 speech, Justice Stewart wrote only one libel opinion, and that in dissent.

In Herbert v. Lando[192] journalists argued for a special editorial

privilege. Anthony Herbert, a retired Army officer who had served in Vietnam, had received media attention in 1969-1970 when he criticized his superiors for covering up war crimes and other atrocities.[193] Three years later Columbia Broadcasting System, Inc., broadcast a program about Herbert and his accusations on the weekly television program "60 Minutes." Barry Lando, the producer and editor of the segment of the program on Herbert, had also written a related article for Atlantic Monthly magazine. Herbert filed a defamation suit claiming that Lando had allegedly portrayed him as "a liar and a person who had made war-crimes charges to explain his relief from command."[194] He also claimed that because of the interview his reputation had suffered damages, and the literary value of his recent book declined.[195]

During district court discovery proceedings Herbert acknowledged that he was a public figure, and knew that he had to prove "actual malice" before he could recover damages from CBS.[196] Herbert deposed Lando at length questioning Lando on his "state of mind" during the editing process. Lando claimed a constitutional privilege not to answer those type of questions.[197] The district court held that there was no constitutional privilege protecting the editorial process under such circumstances and that Lando's state of mind was relevant to the case.[198] The Court of Appeals reversed the district court, holding that the First Amendment does protect the journalist.[199]

By a six-to-three vote, however, the Supreme Court held that the First Amendment does not protect journalists who are responsible for alleged defamatory publication from inquiries into the editorial processes where such discovery may produce evidence that substantiates the plaintiff's cause of action.[200] Writing for the majority, Justice White noted that "editorial discussions or exchanges" are not without constitutional protection from casual inquiry, but in situations where the claim for reckless disregard for

the truth is substantial, then the press must answer the questions asked by the plaintiff.[201] Justice White reasoned that in situations where there is a demonstrated specific need for evidence, "even those rooted in the Constitution," they must give way in proper circumstances.[202]

In his dissenting opinion, Justice Stewart stated that the Court "followed a false trail" in interpreting the New York Times rule.[203] He argued that inquiry into the broad "editorial process" is not relevant in a libel action brought against a newspaper by a public figure.[204] If an inquiry is not relevant, he reasoned, it is not permissible. "The gravamen of such a lawsuit . . . concerns that which was in fact published," he argued.[205] "What was not published has nothing to do with the case."[206]

Justice Stewart also pointed out that by the time this case went to the Court of Appeals the deposition of Lando alone had filled 2,903 pages of transcript, with an additional 240 exhibits.[207] He noted that many of the discovery questions asked of Lando should not have been asked, even under the most liberal interpretations of the Federal Rules of Civil Procedures.[208] He further noted that once the Court acquires its "correct bearings" and realizes that a publisher's motivation is not relevant then "there is clearly no occasion for inquiry into the editorial process as conceptualized in this case."[209] He concluded that the case should be remanded to the district court to be considered under the criteria of the New York Times rule, and "[o]nly then can it be determined whether invasion of the editorial process is truly threatened."[210]

Access to Governmental Facilities

In his Yale Law School address, Justice Stewart noted that the press was free to battle against governmental secrecy and to engage in lawful efforts to acquire information from the government.[211] He noted, however, that the

Constitution only established the contest and not its resolution.[212] After his 1974 address, Justice Stewart wrote four opinions which addressed the question of special privileges for journalists in regard to access to governmental facilities. In Houchins v. KQED[213] journalists tried to acquire access to a county jail, and in Landmark Communications, Inc. v. Virginia,[214] Gannett v. DePasquale,[215] and Richmond Newspapers v. Virginia,[216] journalists were either trying to gain access to courtrooms or trying to report on judicial proceedings.

In Houchins a prisoner in the Greystone portion of the Santa Rita jail in California had committed suicide. The report issued about the prisoner's death included a statement from the prisoner's psychiatrist which noted that the Greystone facility was responsible for the illness of his patient. KQED requested permission to inspect and take pictures of the facility, but was denied access. The NAACP and KQED filed suit to gain access to the facility. After the legal action was filed, Sheriff Houchins began six monthly tours which were open to both the press and the public. The tours, however, did not allow access to the Greystone portion of the jail, and neither cameras nor tape recorders were allowed on the tours.[217]

KQED complained that there was not sufficient access, and filed suit in district court. The district court held that a more flexible press policy should be initiated by the jail. On appeal, the U.S. Court of Appeals, Ninth Circuit, held that the public and the press had a First Amendment right of access to prisons and jails.[218] The U.S. Supreme Court reversed the Ninth Circuit decision, holding that neither the First nor the Fourteenth Amendment gave either a right of access to government information or sources of information under government control.[219]

Writing for the Court, Chief Justice Burger stated, "The issue is a

claimed special privilege of access which the Court rejected in Pell and Saxbe, a right which is not essential to guarantee the freedom to communicate or publish."[220] The Chief Justice acknowledged the role of the media as the "eyes and ears" of the public,[221] and noted that the media was perhaps the most qualified to discover the "malfeasance in public institutions."[222] He emphasized, however, that "like other components of our society media representatives are subject to limits."[223] The Court, he noted, had never intimated that there was a First Amendment guarantee of a right of access to all government sources of information,[224] and he further stated that the First and Fourteenth Amendments did not mandate disclosure of government information or access to government sources.[225]

Justice Stewart, concurring, stated that the Constitution only "assure[s] the public and the press equal access once government has opened its doors."[226] He noted, however, that he differed with the majority opinion in the understanding of the term "access." He stated that the Chief Justice viewed the term as "equal access" for both public and the press. Justice Stewart expressed there should be some flexibility to accommodate for the difference between the press and the public.[227]

"That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident," Stewart wrote, "but an acknowledgement of the critical role played by the press in American society."[228] He further argued that the "Constitution requires sensitivity to that role and to the special needs of the press."[229] The journalist, he stated, would tour the prison or jail differently than a member of the public, and would collect information to pass on to others. Thus, the journalist would be fulfilling his mission as outlined by the Constitution, Justice Stewart reasoned. "In short," he concluded, "terms of access that are

reasonably imposed on individual members of the public may, if they impeded effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see."[230]

In this case, Justice Stewart noted, the sheriff restricted the media by making them leave their cameras and tape recorders outside of the prison; thereby, reducing the journalists news gathering effectiveness.[231] He concluded that in future cases where the media is seeking access to prisons or jails that the court's decree must be "framed to accommodate equitably the constitutional role of the press and the institutional requirements of the jail."[232]

In Landmark Communications, Inc. v. Virginia,[233] the Virginian Pilot newspaper published an accurate article on a pending inquiry of a judge's alleged misconduct by the Virginia Judicial Inquiry and Review Commission. The article identified the judge and indicated that there were no formal complaints filed against the judge at the time. A month later, a grand jury indicted the newspaper for violating a Virginia statute which forbade divulging the identification of a judge under investigation.[234] At the trial a month later the newspaper was found guilty and fined. On appeal, the Supreme Court of Virginia affirmed the conviction.[235] The U.S. Supreme Court reversed.[236]

Writing for the majority, Chief Justice Burger stated that the information of the Virginia Commission's investigation was a matter of public interest, and by publishing an accurate account of the Commission's proceedings which had been lawfully acquired, the newspaper was performing its First Amendment function of informing the public.[237] He further noted that neither the protection of the reputation of the Virginia judges nor

maintaining the institutional integrity of the courts was sufficient reason to justify the punishment of speech by third parties to the proceedings.[238] In general, Chief Justice Burger concluded, the Virginia courts' arguments for punishing the newspaper were unpersuasive.[239]

Justice Stewart, in a brief concurring opinion, noted that Virginia did have the right to protect the dignity of its judges and courts, but the courts had over-stepped their authority when they punished the newspaper for publishing the judge's name.[240] "If the constitutional protection of a free press means anything," he reasoned, "it means that government cannot take it upon itself to decide what a newspaper may and may not publish."[241] He further stated that the government may punish for the theft of information or may deny access to sources of government information, but once the information falls into the hands of the press, the government may not prohibit or punish the publication, "unless the need for secrecy is manifestly overwhelming."[242]

In Gannett Co., Inc. v. DePasquale[243] the press argued for a special privilege to attend a pretrial hearing from which the putlic had been barred. Wayne Clapp, a former town policeman, was killed near his home, and the local newspapers reported the details of the murder. When the two murder suspects appeared at a pretrial suppression hearing, the defendants' attorney moved to have the courtroom cleared of the public and the press in order to assure the defendants' right to a fair trial. The reporter, present in the courtroom, did not object to the closure order, but the next day a complaint was filed challenging the order on First, Sixth, and Fourteenth Amendment grounds.[244]

The Supreme Court, Appellate Division, of the State of New York vacated the orders to exclude the press and the public from the pretrial hearing, and the appeal was taken to the Court of Appeals, the New York high court. The

Court of Appeals held that where a defendant's right to a fair trial was jeopardized and the public interest in the case was one of curiosity more than judicial accountability, then closure of the pretrial hearing was proper.[245] By a five-to-four vote the U.S. Supreme Court affirmed the decision, holding that members of either the public or the press have no Sixth or Fourteenth Amendment rights to attend pretrial hearings.[246]

Justice Stewart, writing for the plurality, noted that publicity from a pretrial hearing "could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissable at the actual trial."[247] He stated that the trial judge had acted properly by balancing the defendants' rights to a fair trial against the constitutional rights of the press and public.[248] He noted that at the pretrial hearing the reporter did not object to the defendants' closure motion, and the trial judge did have the right to exclude the public and the press, as well as deny the press access to a transcript of the hearing. "In short," he stated, "the closure decision was based on an assessment of the competing societal interests involved."[249]

Justice Stewart pointed out that the closure was only temporary and not absolute. Once the danger of prejudicial publicity had passed, he noted, the transcript of the pretrial suppression hearing was made available to the press. Thus, he reasoned, "any First and Fourteenth Amendment right of the petitioner to attend [the] criminal trial was not violated."[250] He concluded that the Constitution provided no right of access for the newspapers to the pretrial proceedings.[251]

In Richmond Newspapers, Inc. v. Virginia[252] journalists argued for a special privilege to attend criminal trials. The defendant, Stevenson, had been indicted for the murder of a hotel manager and was on trial for the

fourth time. The trial judge, fearful of the effect of prejudicial trial publicity, ordered the courtroom cleared of the public and the press. Journalists attending the trial did not object to the closure order. Later that day, the journalists sought a hearing on the judge's motion but were denied access to the trial.[253] After the Virginia Supreme Court denied review of the case, the U.S. Supreme Court reversed.[254]

Chief Justice Burger, writing for the Court, found the case to mark the first time the issue of attending a criminal trial had been before the Court.[255] He noted that the Court in Gannett had held that neither the media nor the public had a Sixth Amendment right to attend a closed pretrial hearing.[256] The Chief Justice stated that the First Amendment could be read to protect the public's right to attend trials. He added, "[T]he First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted."[257]

The Chief Justice concluded that there was no indication that the press or the public's right was even considered by the lower court. Also, there were no other judicial safeguards considered to protect against prejudicial publicity, such as change of venue or sequestering the jury.[258] He stated, "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without such freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated."[259]

Justice Stewart, concurring, stated that the First Amendment clearly gives the public and the press a right of access to both civil and criminal trials.[260] He noted that the "courtroom is a place where representatives of the press and of the public are not only free to be, but where their presence

serves to assure the integrity of what goes on."[261] He concluded, however, that this right is not absolute, and a trial judge does have the right to "impose reasonable restrictions" upon the courtroom. Such restrictions, he noted, maybe the physical size of the courtroom or limitations on the number of spectators attending the trial.[262] In this case, since the judge did not acknowledge either the press or the public's right to attend the trial, he concluded, the judgment must be reversed.[263]

Justice Stewart appears to be consistent in terms of excluding the press in government areas where the public is not allowed. Once the doors are open to the public and the press, however, in order to accommodate their newsgathering function the press should have special privileges beyond that of the public, i.e., to allow for television cameras and recorders. To extend this line of reasoning, if the press has special privileges in areas where both the public and the press have access, would Justice Stewart grant the public access to the media?

Access to the Media

Justice Stewart stated in his Yale Law School address that the Court has denied governmental intervention into the editorial process even in cases where such intervention would make the press a "genuinely fair and open 'marketplace of ideas.'"[264] After his 1974 address, Justice Stewart wrote one concurring and one dissenting opinion which address this aspect of his speech.

In a commercial speech case, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,[265] the Virginia Citizens Consumer Council claimed that a Virginia statute denying consumers information about drug prices violated their First and Fourteenth Amendments.[266] The statute stated that a licensed pharmacist was guilty of unprofessional conduct if he

advertised the prices of pharmaceutical drugs.[267] The district court declared the statute void, and the U.S. Supreme Court affirmed the decision.[268]

Justice Blackmun, writing for a seven-member majority, stated that there is a First Amendment right to receive information and ideas. Just because the speech in this case was commercial in nature, he reasoned, does not mean that it is not protected by the First Amendment.[269] He noted that the information was of benefit to the general public and particularly would help those people on a fixed income.[270] He noted that while commercial speech is protected, some forms of commercial speech are subject to time, place and manner restrictions.[271] He concluded that a state may not suppress the dissemination of truthful information about a lawful activity.[272]

In his concurring opinion, Justice Stewart stated that the majority opinion implied that there was a difference between commercial speech and ideological speech.[273] Commercial speech, he reasoned, was limited to the promotion of specific goods or services, and the First Amendment protects this speech because of the information potential to the general public. He argued that the claims made by advertisers can be empirically checked without "jeopardizing the free dissemination of thought." He further noted that advertising deserved First Amendment protection because of "its contribution to the flow of accurate and reliable information relevant to public and private decision-making."[274]

In Federal Communications Commission v. Pacifica Foundation,[275] government intervention was sought because of the broadcast of an "indecent" program. A New York City radio station had broadcast George Carlin's monologue entitled "Filthy Words" during the afternoon. A father driving on the freeway with his son heard the broadcast, and complained to the FCC about

the material. The FCC determined that the material was "indecent" and was prohibited under provisions of the Communications Act. The U.S. Court of Appeals reversed the FCC's decision.[276] The Supreme Court, reversing the Court of Appeals decision, upheld the action of the FCC.[277]

Justice Stevens, writing for the majority, noted that the question of the case is whether the First Amendment denies the government any "power to restrict the public broadcast of indecent language in any circumstances."[278] He stated that the FCC does have the right to "impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting." He also noted that this was the "appropriate occasion" for the government to exercise its authority.[279]

Justice Stevens wrote that the broadcast had neither political content nor did it satirize attitudes about four-letter words. He found the broadcast words were "vulgar," "offensive," and "shocking," which limited their First Amendment protection. He concluded, "Words that are common place in one setting are shocking in another."[280]

Broadcasting, by its very nature, Justice Stevens held, has received "limited First Amendment protection." He found the broadcast media to have a "pervasive presence" in the American way of life, and indecent material intrudes upon the public's privacy. He noted also that broadcasting is "uniquely accessible to children, even those too young to read," which justifies the special treatment of indecent broadcasting.[281] He concluded, "We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[282]

In his dissenting opinion, Justice Stewart argued that since the Carlin monologue was determined by the Commission to be "indecent" rather than

"obscene," then the "Commission lacked [the] statutory authority to ban it."[283] He stated that "indecent" is a broader concept than something that is "obscene." Consequently, the Commission has a broader power to regulate speech that would otherwise "be constitutionally protected outside the context of electronic broadcasting."[284] He concluded that the Court of Appeals ruling should have been affirmed.[285]

Justice Stewart stated that he would include commercial speech under the umbrella of the First Amendment. In addition, he would scrutinize the labeling of speech, which may be offensive to some and not offensive to others, so that a broader power to regulate speech would not be attained.

Summary and Conclusions

As a jurist, Justice Stewart was generally consistent in his opinions both before and after his 1974 Yale Law School address in regard to maintaining the autonomy of the press. He regularly demonstrated a sensitivity toward the role of the press in society often aligning himself with special privilege arguments presented by journalists, no matter how qualified the privilege might become through judicial modification. His opinions generally reflected a concern for finding a balance between societal and press interests so that freedom of the press would not be unduly impaired or compromised by governmental encroachment.

His opinion in Garland v. Torre perhaps best demonstrates his resolution of First Amendment claims. In Torre, he outlined the criteria that should be met before journalists must disclose their sources. The courts have relied upon these guidelines rather extensively, and have recognized in some cases a special First Amendment privilege of protecting confidential sources.

Justice Stewart was consistent in both his dissent in Branzburg, in which he restated in essence his Torre decision, and in Zurcher where he

argued for a less disruptive means of acquiring information from newspapers by local police. In Zurcher, he reiterated the theme that confidential news sources might be revealed by the surprise warrant searches by police as opposed to the use of subpoenas. It was argued that use of subpoenas would be less disruptive of the editorial processes and would afford more protection to the journalist attempting to safeguard his confidential news sources. His concern in both dissents was that the press would become inhibited and the public would not receive the information necessary to make informed decisions.

Floyd Abrams observed that Justice Stewart would not permit "first amendment values to be balanced for the press in a manner that might compromise its independence."[286] Justice Stewart's decisions in Pittsburgh Press, Democratic National Committee, and Landmark Communications echo this theme. He stated in dissent in Pittsburgh Press, for example, that the government should not become involved in the editorial process of any newspaper in this country; in Democratic National Committee he concurred by stressing the need for editorial autonomy of the electronic media; and in a brief concurring opinion in Landmark he agreed with the Court's opinion only in regard to the press. Rowena Scott Comegys observed that Justice Stewart's opinions allowed the press such latitude in order to fulfill its Fourth Estate potential "by asserting its institutional autonomy, an approach that put him out of the majority in many cases. Apparently, he based his decisions in favor of the press on whether in a given situation the press was acting as a 'formidable check on official power.'"[287]

Justice Stewart has also upheld the idea of the press participating in a robust and active role in the exchange of information about public officials. He supported this theme in the defamation cases of Greenbelt Cooperative,

Monitor Patriot, Pape, and Ocala Star-Banner. Even when the press confused the identity of a person running for office with his brother, who was charged with a crime, Justice Stewart noted that such information was one of the strongest applications of the New York Times rule. He acknowledged that newspapers did occasionally get the story wrong, but as long as the publication was made without actual malice, the newspaper should not be punished. In Herbert v. Lando, he dissented from the majority, noting that the Court had misinterpreted the New York Times rule and that the plaintiff did not have the right to probe into the journalist's "state of mind." In other words, Justice Stewart would have granted media defendants a special privilege under such circumstances.

A closer examination of Justice Stewart's opinions reveals some apparent contradictions. For example, how can Justice Stewart's dissent in Branzburg, where he said a corollary to the right to publish news is the right to gather news, be reconciled with his decision in Pell, where the press was denied access to prison facilities? Anthony Lewis, a New York Times columnist, suggested that what is at issue is not the special privilege of the press over that of the public but that our public institutions must be held publicly accountable.[288] In Houchins, for example, the vote was a three-to-one-to-three split with Justice Stewart's concurring opinion supplying the needed fourth vote. Justice Stewart upheld the right of prison officials to deny the press access where the public was not allowed. But where the public and the press were allowed, the television cameras should be allowed into the prison facilities in order for the press to report effectively on prison activities. Lewis argued it was not so much a special privilege Justice Stewart was proposing, as much as the press was acting as a representative of the public.[289] Lewis suggested what Justice Stewart may

have meant in Branzburg was not the press' right to gather news, but, rather "the right to seek the news without official interference in the process."[290] If this is the meaning, Lewis noted, then it could have a "chilling intrusion" on the editorial process and could inhibit editors from publishing or broadcasting stories for fear of government intervention through grand jury action or subpoenas.

This apparent contradiction in Justice Stewart's opinions might be resolved by looking at another theme in his Yale Law School address, i.e., the press should be autonomous from the government. Examining the prison access cases from this viewpoint might help explain the apparent contradiction. In other words, Justice Stewart's position could be viewed as consistent with the premise that in order to maintain the autonomy of the press there should be a separation from the government at all costs. Any special privileges granted to the press in regard to access to governmental facilities by the government would tend to compromise press autonomy.[291] Vincent Blasi has supported this idea in what he calls his "checking value" theory. He postulates that free speech, free press, and free assembly serve to check the abuse of power by public officials.[292] Also, Randall Bezanson, professor of law at the University of Iowa College of Law, has observed that the autonomy of the press was part of a new emerging theory of freedom of the press being developed by the Court.[293]

This role of press autonomy as envisioned by Justice Stewart helps explain his decision in Gannett v. DePasquale where a newspaper was denied a Sixth Amendment right of access to a pretrial hearing. Justice Stewart, consistent with his opinions in Pell, Saxbe, and Houchins, held that the press would not be accorded any special privilege over that of the general public. Only in Houchins did he waiver from this position, and then he did not waiver

by much. In Houchins, he argued when the public and the press have access to a governmental facility such as a jail that the press may need special consideration in order to effectively report on a government institution. His decision in Gannett illustrates where he would draw the line in access to government facilities. In Richmond Newspapers, however, Justice Stewart noted there was a qualified First Amendment access for the public and the press to attend either a criminal or civil trial.

Finally, it should be remembered that while Justice Stewart told his Yale Law School audience that he viewed the Press Clause as affording protection to the press as an institution, free to publish what it knows and to learn what it can, this does not mean that the Constitution affords a guarantee that the press will always succeed. Indeed, Justice Stewart concluded that the Constitution merely established the contest in which the press is free to do battle against secrecy and deception in government. Justice Stewart's opinions dealing with special privilege issues in the various newsgathering areas discussed above perhaps can best be understood in terms of his vision of such an autonomous role for the institutional press.

NOTES

[1]Sandalow, Potter Stewart, 95 HARV. L. REV. 6 (1981).

[2]J. Israel, Potter Stewart, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES & MAJOR OPINIONS 292 (L. Friedman & F. Israel eds. 1969).

[3]N.Y. Times, June 20, 1981 at A9, Col. 3.

[4]Padgett, The Voting Record of Justice Stewart on First Amendment Cases, 59 JOURNALISM QUARTERLY 554 (1982). See also Schwartz, A RECONCEPTUALIZATION OF THE FIRST AMENDMENT: THE BURGER COURT AND FREEDOM OF THE PRESS, 1969-1980, 159 (Southern Illinois University, 1981) (unpublished manuscript).

[5]Schwartz, supra note 4. See also Israel, supra note 2.

[6]Schwartz, supra note 4, at 189-190. See also L. Friedman, Potter Stewart, 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES & THEIR OPINIONS, 291 (L. Friedman ed. 1978).

[7]Id. at 190.

[8]See, e.g., Abrams, The Press IS Different: Reflections on Justice Stewart and the Autonomous Press, 7 HOFSTRA L. REV. 563 (1979); Barron, Whose First Amendment? 46 VITAL SPEECHES OF THE DAY 313 (1980); Bezanson, The New Free Press Guarantee, 63 VA. L. REV. 731 (1977); Blanchard, The Institutional Press and Its First Amendment Privileges, in 1978 SUP. CT. REV. 225 (P. Kurland & G. Casper, eds. 1979); Bork, The First Amendment Does Not Give Greater Freedom to the Press Than to Speech, 12 CENTER MAGAZINE 29 (March-April 1979); Comment, Examining the Institutional Interpretation of the Press Clause, 58 TEX. L. REV. 171 (1979); Comment, The Supreme Court and the Press: Freedom or Privilege? 12 AKRON L. REV. 261 (1978); Comment, Problem in Defining the Institutional Status of the Press 11 U. RICH. L. REV. 177 (1976); Lange, The Speech and Press Clauses, 23 U.C.L.A. L. REV. 77 (1975); Lewis, A Public Right to Know About Public Institutions: The First Amendment As Sword, in 1980 SUP. CT. REV. 1 (P. Kurland & G. Casper, eds. 1980); Lewis, A Preferred Position for Journalism? 7 HOFSTRA L. REV. 595 (1979); Nimmer, Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech? 26 HASTINGS L. J. 639 (1975); Note, The Supreme Court and the Not-So-Privileged Press, 13 UNIV. RICH. L. REV. 313 (1975); Powe, Or of the (Broadcast) Press, 55 TEX. L. REV. 39 (1975); Sack, Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press, 7 HOFSTRA L. REV. 629 (1979); Van Alstyne, The Hazards to the Press of Claiming a "Preferred Position," 28 HASTINGS L. J. 761 (1977); Warton, Freedom of Speech or of the Press: The Broadcaster as Citizen and Institution, 5 J. CONTEMP. L. 339 (1979).

[9]Stewart, Or of the Press, 26 HASTINGS L.J. 631, 636 (1975).

[10]Id.

[11]Id.

[12]Id. at 635 (emphasis in original).

[13]This information was obtained through the use of LEXIS and WESTLAW computer searches. The search phrase used for LEXIS was "OPINIONS AND WRITTENBY [STEWART] AND CCURT [FIRST]," and for each circuit the number was changed, i.e., from First to Second, etc. The WESTLAW search phrase was "COURT (CA6) & JUDGE (STEWART) & (the various numbers for specific headnotes that related to the First Amendment area)."

[14]246 F.2d 842 (2d Cir. 1957).

[15]259 F.2d 545 (2d Cir. 1958), cert. denied 358 U.S. 910 (1958).

[16]Annot. 7 A.L.R.3d 591, 592 (1966).

[17]Garland v. Torre, 259 F.2d at 547.

[18]M. Franklin, THE FIRST AMENDMENT AND THE FOURTH ESTATE 407 (2d ed. 1981).

[19]259 F.2d at 548.

[20]Id.

[21]Id.

[22]Id. at 549.

[23]Id.

[24]Id. at 550.

[25]Note, Reporter and Their Sources: The Constitutional right to a Confidential Relationship, 80 YALE L.J. 317, 322 (1970).

[26]D. Gillmor & J. Barron, MASS COMMUNICATIONS LAW: CASES AND COMMENT 408 n.6 (3d ed. 1979).

[27]256 F.2d at 550.

[28]Id. at 551. Federal and state courts have cited Torre more than seventy times during the past twenty-five years. In only twenty cases were journalists able to attain special privilege, and in those cases the courts did not discriminate between the two tests. Each test was applied an equal number of times.

[29]H. Nelson & D. Teeter, LAW OF MASS COMMUNICATIONS 357 (4th ed. 1982).

[30]408 U.S. 665, 668 (1972).

[31]See Thompson v. State, 170 N.W.2d 101 (Minn. 1969) and Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

[32]408 U.S. 665 (1972).

[33]266 N.E.2d 297 (Mass. 1971).

[34]461 S.W.2d 345 (Ky. 1970).

[35]434 F.2d 1059 (9th Cir. 1972).

[36]408 U.S. at 706.

[37]Id. at 725 (Stewart, J., dissenting).

[38]Id. at 743.

[39]259 F.2d 545.

[40]408 U.S. at 743 n.33 (Stewart, J., dissenting).

[41]See D. Gordon, Had Black ruled in Branzburg . . . in JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 132, 145 (E. Dennis, D. Gillmor, & D. Grey eds. 1978). Journalists were more successful in the courts at obtaining a special testimonial privilege after Branzburg. There are forty-eight post-Branzburg cases citing Torre and a special testimonial privilege was granted in seventeen of the forty-eight cases. Journalists were granted a special testimonial privilege not to reveal their sources in a grand jury proceeding in Bursey v. United States, 466 F.2d 1059 (1972); in cases involving general civil litigation, see Baker v. F & F Investments, 470 F.2d 778 (2d Cir. 1972); Democratic Nat'l Convention v. McCord, 356 F. Supp. 1394 (U.S.D.C. 1973); Conn. State Bd. of Labor Relations v. Fagin, 33 Conn. Supp. 204 (1976); Gilbert v. Allied Chem. Corp., 563 F. Supp. 1505 (E.D.Va. 1976); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Gulliver's Periodicals, Ltd. v. Charles Levy Circulation Co., Inc., 455 F. Supp. 1197 (N.D.Ill. 1978); In re Consumer's Union of the United States, Inc., 495 F. Supp. 582 (S.D.N.Y. 1980); and Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 89 F.R.D. 489 (C.D. Cal. 1981); in defamation action cases where a shield law was involved, see Saxton v. Arkansas Gazette, Co., 569 S.W.2d 115 (Ark. 1978); Schultz v. Reader's Digest, 468 F. Supp. 551 (E.D.Mich. 1979); and Steaks Unlimited, Inc. v. Deaver, 623 F.2d 264 (2d Cir. 1980); in defamation cases where the shield law was dismissed by the courts, see KSDO v. Superior Court of Riverside Co., 186 Cal. Rptr. 211 (1982); in defamation cases where societal interests were balanced, see Mize v.

McGraw-Hill, Inc., 86 F.R.D. 1 (S.D.Tex. 1980); Cervantes v. Time, Inc., 464 F. Supp. 780 (S.D.N.Y. 1980); In re Forbes Magazine, 494 F. Supp. 780 (S.D.N.Y. 1980); and Senear v. Daily Journal American, 681 P.2d 536 (Wash. 1980).

[42]612 F.2d 708 (3rd Cir. 1979).

[43]Id. at 715. The Court held that in diversity cases, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). This would imply that there should be no federal common law. In other words, the federal judges can not make law unless granted that power by Congress. The Circuit Court of Appeals, Third Circuit, however, recognized a qualified federal common law right for journalists to protect their sources. This would mean then absent a state shield law in the Third Circuit a journalist in a federal court would have a qualified common law right to protect his source. See also L. Tribe, AMERICAN CONSTITUTIONAL LAW 114-119 (1978).

[44]This information was acquired through a LEXIS search using the search phrase "OPINIONS AND WRITTENBY [STEWART]," or the search phrase "MEDIA OR SPEECH OR PRESS OR RADIO OR TELEVISION OR NEWSPAPER OR PRESS FREEDOM OR SPEECH FREEDOM AND FIRST AMENDMENT AND CONCURRBY [STEWART]." The "CONCURRBY" phrase was changed to "DISSENTBY" or "WRITTENBY," depending upon which set of opinions was being searched for. This information was verified by WESTLAW and individually examining one-hundred volumes of U.S. Court Reports.

[45]See Stewart, supra note 9, at 635.

[46]408 U.S. 665 (1972).

[47]See Stewart, supra note 9, at 635.

[48]Id. (emphasis in original).

[49]408 U.S. at 709.

[50]Id. at 681.

[51]Id. at 682.

[52]See New York Times v. Sullivan, 376 U.S. 254 (1964).

[53]See Zemel v. Rusk, 381 U.S. 1, 16-17 (1965).

[54]259 F.2d 545 (2d Cir. 1958).

[55]408 U.S. 684-692.

[56]Id. at 725 (Stewart, J., dissenting).

[57] Id.

[58] Id.

[59] Id. at 727.

[60] Id.

[61] Id.

[62] Id. at 733.

[63] Id. at 731.

[64] Id. at 737.

[65] Id. at 738.

[66] See supra text accompanying note 38.

[67] 408 U.S. at 743.

[68] Id. at 744.

[69] Id.

[70] Id.

[71] Id. at 745.

[72] Id.

[73] Id. at 746.

[74] Id.

[75] Id. at 709 (Powell, J., concurring).

[76] Id. at 710.

[77] See Stewart, supra note 9, at 635.

[78] Id.

[79] 398 U.S. 6 (1970).

[80] Id. at 7.

[81] Id. at 8.

[82] Id. at 14.

[83]376 U.S. 254 (1964).

[84]Id. at 279-280. The New York Times rule or defense has been expanded by the Supreme Court to include public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); to private citizens involved in public concern or newsworthy situations in Rosenbloom v. Metromedia, 403 U.S. 29 (1971); to include criminal libel in Garrison v. Louisiana, 379 U.S. 64 (1974); and public figures were redefined in Gertz v. Welch, 418 U.S. 323 (1974).

[85]Id. at 9.

[86]Id. at 10.

[87]Id. at 11.

[88]Id.

[89]Id. at 12.

[90]Id. at 14.

[91]401 U.S. 265 (1971).

[92]Id. at 266.

[93]Id. at 267.

[94]Id. at 277.

[95]Id. at 272.

[96]Id. at 274.

[97]Id. at 276.

[98]Id. at 277.

[99]Id.

[100]401 U.S. 279 (1971).

[101]Id. at 282.

[102]Id.

[103]Id. at 283.

[104]Id. at 292.

[105] Id. at 290.

[106] Id. at 291.

[107] Id. at 286.

[108] Id. at 289-290.

[109] 401 U.S. 295 (1971).

[110] Id. at 296.

[111] Id. at 298-299.

[112] Id. at 301.

[113] Id. at 300.

[114] Id. at 301.

[115] See Stewart, supra note 9, at 636.

[116] Id.

[117] 417 U.S. 817 (1974).

[118] 417 U.S. 843 (1974).

[119] 417 U.S. 817 (1974).

[120] Id. at 819.

[121] Id. at 830.

[122] Id. at 834.

[123] Id.

[124] Id. at 830.

[125] Id.

[126] Id. at 835.

[127] 417 U.S. 843 (1974).

[128] Id. at 844.

[129] Id. at 845.

[130] Id. at 851.

[131] Id. at 849.

[132] Id. at 851.

[133] Id. at 850.

[134] Id. at 847.

[135] Id.

[136] Id.

[137] Id. at 848.

[138] Id. at 847.

[139] See Stewart, supra note 9, at 635.

[140] 413 U.S. 376 (1973).

[141] 412 U.S. 94 (1973).

[142] 413 U.S. at 379.

[143] Id. at 339.

[144] Id. at 340.

[145] Id. at 392.

[146] Id. at 386.

[147] Id. at 383.

[148] Id. at 387.

[149] Id. at 388 (emphasis in original).

[150] Id. at 390.

[151] Id. at 400 (Stewart, J., dissenting).

[152] Id. at 402.

[153] Id. at 401.

[154] Id. at 402.

[155] Id. at 403.

[156] Id. at 404.

[157] Id.

[158] 412 U.S. 94 (1973).

[159] Id. at 99.

[160] Id. at 98.

[161] Id. at 100.

[162] Id. at 132.

[163] Id. at 122.

[164] Id. at 125.

[165] Id. at 130.

[166] Id. at 133 (Stewart, J., concurring).

[167] Id. (emphasis in original).

[168] Id. at 144.

[169] Id. (emphasis in original).

[170] Id. at 145.

[171] Id.

[172] Id. at 146.

[173] Id.

[174] 436 U.S. 547 (1978).

[175] Id. at 550.

[176] Id. at 551.

[177] Id. at 551-552.

[178] Id. at 552.

[179] Id. at 553.

[180] Id. at 556.

[181] Id. at 571 (Stewart, J., dissenting).

[182] Id.

[183] Id. at 572.

[184] Id.

[185] Id. at 573.

[186] Id.

[187] Id. at 575.

[188] Id.

[189] Id. at 576.

[190] Id.

[191] See Stewart, supra note 9, at 635.

[192] 441 U.S. 153 (1979).

[193] Id. at 156.

[194] Id.

[195] Id.

[196] Id.

[197] Id. at 157.

[198] Id.

[199] Id. at 158.

[200] Id. at 175.

[201] Id. at 174.

[202] Id. at 175.

[203] Id. at 201 (Stewart, J., concurring).

[204] Id. at 199.

[205] Id. at 200.

[206] Id. (emphasis in original).

[207] Id. at 202.

[208] Id. at 201-202.

[209] Id. at 201.

[210] Id. at 202.

[211] See Stewart, supra note 9, at 636.

[212] Id.

[213] 438 U.S. 1 (1978).

[214] 435 U.S. 829 (1978).

[215] 442 U.S. 368 (1979).

[216] 448 U.S. 555 (1980).

[217] 438 U.S. at 3-5.

[218] Id. at 7.

[219] Id. at 15.

[220] Id. at 12. For a discussion of Pell and Saxbe, see supra text accompanying notes 117-118.

[221] Id. at 8.

[222] Id. at 14.

[223] Id. at 9.

[224] Id.

[225] Id. at 15.

[226] Id. at 16 (Stewart, J., concurring).

[227] Id.

[228] Id. at 17.

[229] Id.

[230] Id.

[231] Id. at 18.

[232] Id. at 19.

[233] 435 U.S. 829 (1978).

[234] Id. at 831.

[235] Id. at 832.

[236] Id. at 839.

[237] Id.

[238] Id. at 841.

[239] Id. at 845.

[240] Id. at 849 (Stewart, J., concurring).

[241] Id.

[242] Id.

[243] 442 U.S. 369 (1979).

[244] Id. at 372-377.

[245] Id. at 377.

[246] Id. at 391.

[247] Id. at 378.

[248] Id. at 392.

[249] Id. at 393.

[250] Id.

[251] Id. at 394.

[252] 448 U.S. 555 (1980).

[253] Id. at 559-562.

[254] Id. at 581.

[255] Id. at 564.

[256] 448 U.S. at 565.

[257] Id. at 576.

[258] Id. at 581.

[259] Id. at 580.

[260] Id. at 599 (Stewart, J., concurring).

[261] Id. at 600.

[262] Id.

[263] Id. at 601.

[264] See Stewart, supra note 9, at 635.

[265] 425 U.S. 748 (1976).

[266] Id. at 749.

[267] Id. at 750.

[268] Id. at 773.

[269] Id. at 757-759.

[270] Id. at 763.

[271] Id. at 770.

[272] Id. at 773.

[273] Id. at 779 (Stewart, J., concurring).

[274] Id. at 780.

[275] 438 U.S. 726 (1978).

[276] Id. at 729-733.

[277] Id. at 751.

[278] Id. at 744.

[279] Id. at 738.

[280] Id. at 746.

[281] Id. at 748-750.

[282] Id. at 751.

[283]Id. at 778 (Stewart, J., dissenting).

[284]Id.

[285]Id. at 780.

[286]Abrams, The Press IS Different: Reflection on Justice Stewart and the Autonomous Press, 7 HOFSTRA L. REV. 563, 568 (1979) (emphasis in the original).

[287]Comegys, Potter Stewart: An Analysis of His Views on the Press as Fourth Estate, 59 CHI.[-]KENT L. REV. 157, 207 (1982).

[288]Lewis, A Preferred Position for Journalism? 7 HOFSTRA L. REV. 621 (1979).

[289]Id. at 623.

[290]Id. at 624.

[291]See also Lewis, supra note 288, at 624-625; Comegys, supra note 287, at 164; and BeVier, An Informed Public, An Informing Press: The Search for a Constitutional Principle, 68 CALIF. L. REV. 482, 490-492.

[292]Blasi, The Checking Value in First Amendment Theory, AM. BAR FOUND. RESEARCH J. 521, 527 (1977).

[293]Bezanson, The New Free Press Guarantee, 63 VA. L. REV. 731 (1977).